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No. 89-1530

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

vs.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Defendants.

REPLY TO NON-FEDERAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD F. FOGARTY
FOGARTY, LUND & GROSS
700 Service Life Building
1904 Farnam Street
Omaha, Nebraska 68102
(402) 341-3333

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. NON FEDERAL APPELLEES' ARGUMENT IGNORES THE POLICY REASON WHY THIS PETITION SHOULD BE GRANTED.

The pernicious prong of the Eighth Circuit's *Ringsred* test for triggering NEPA or NHPA is "whether the overall federal involvement with the project is sufficient to turn an essentially private action into federal action." *Rinsgred v. City of Duluth*, 828 F2d 1305, 1308 (8th Cir. 1987). Same rule at *N.A.A.C.P. v. Medical Center Inc.*, 584 F2d 618 (3d Cir. 1978). This effectively encourages the federal regulator to apply NEPA and NHPA in "non federal projects" only where the federal presence is so overwhelming that the project isn't really "non federal" at all.

Granting *certiorari* turns on whether this Court feels this is the time and the case to address the issue. Nevertheless, the non-federal Appellees did not discuss the matter. Instead, a straw man was set up and knocked down: the Courts below made *factual* findings of no ICC, Corps, or NPS approval jurisdiction over the "Jobbers Canyon Project."

The straw man's first defect is obvious and merely semantical. There is no "Jobbers Canyon Project," rather, a Riverfront project that calls for rerouting sewers, changing rail traffic, changing park plans paid for in part by federal funds, building a park and some buildings and streets, and knocking other buildings (Jobbers Canyon) down. A proper framing of the question to obviate the first defect of the straw man would be of this sort: Assuming *arguendo* ICC, Corps, or NPS approval jurisdiction, does a proper Environmental Impact Statement (EIS)

or 106 Review include discussion of Jobbers Canyon fate, alternatives, and mitigation measures? This reaches the second issue in the Petition: Are impacts off site considered, which is really no issue at all. No court anywhere has taken Judge Kopf's extreme position (Pet.App. 68-71) that NEPA and NHPA consider only on site impacts, in this case *on* the rails, *in* the park, or *over* the sewers.

We turn to the second defect of the straw man and that will take up the rest of this Reply. Appellees suggest no federal jurisdiction was found below on the basis of contested facts resolved against the Petitioner, and this Court doesn't reweigh contested facts. We do not ask this Court to re-examine disputed facts. Our position is that upon facts not in dispute, the ICC, the Corps, and NPS has approved jurisdiction as a matter of law. This paves the way to the significant inquiry sought by Petitioner whether or not NEPA and NHPA is restricted to essentially federal projects, the unavoidable terminus of following the third prong of *Ringsred*.

II. THIS COURT IS NOT REQUIRED TO REVIEW DISPUTED FACTS TO ESTABLISH ICC, CORPS, AND NPS APPROVAL JURISDICTION, ONLY NOTE THE LEGAL CONCLUSIONS THAT FOLLOW FROM FACTS NOT IN DISPUTE ON THE RECORD.

The courts below simply refused to address petitioner's contention that legal approval jurisdiction followed necessarily from facts *certain* and *undisputed by any party*.

Those facts, briefly, are as follows. *ICC:* The Union Pacific Railroad traffic rerouted to Burlington Northern

lines historically was and is one train a day, usually seven days a week (occasionally only three) carrying 20 to 40 cars a day from Union Pacific's Council Bluffs, Iowa yards to customers in North Omaha. Shipments out of North Omaha made up the return train to Council Bluffs for further routing across the country. (A rough drawing of the rerouting required by the Riverfront Redevelopment Project follows this brief.) *CORPS:* As to the Corps of Engineers' interest, it is undisputed the floodwall, pressurized sewers spread over the lower downtown area, and pumps constituted the protective works providing flood protection to downtown Omaha including the Redevelopment area. The wall alone would protect against high river events, but the pumps and pressure sewers operated to keep storms, rapid thaw and other city side high water events from flooding the downtown side of the wall by backing up a reservoir. It is uncontested the City got a private consultant, Schimmer and Associates, to devise the sewer and pump changes required by the Redevelopment (Ex. 341) and that the City *did not* submit these plans to the Corps. *NPS:* As to the park, NPS funds partially paid for land acquisition and a set of 1983 plans that designed public access all around the shore of the lake and accommodated several public street approaches to the lake and park from the south and the west. The Riverfront ConAgra campus changed that, cutting off all south public access, all west public access but one small area, and took the entire west and south shore line onto ConAgra property, depriving the public the right to stroll around the lake. On the above conceded and uncontested facts, ICC, Corps, and NPS had approval jurisdiction as a matter of law.

A. Interstate Commerce Commission.

The ICC has jurisdiction over and must approve all joint use agreements (Burlington Northern's lease of lines to Union Pacific to reroute traffic), 49 U.S.C. § 11343(a)(6), and abandonments (Side Hill Lead), *id.* § 10903(a), unless the tracks involved are exempt as "spur, industrial, team, switching, or side tracks," *id.* 10907(a). On the other hand, if the tracks can properly be characterized as "railroad lines" other than spurs and the like, joint use agreements and abandonments *must* be approved by the ICC. Whether a track is a "railroad line" or a "spur, industrial, team, switching, or side track" depends on the function of the track. See *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967):

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad or extension thereof" and there can be no abandonment of such trackage without obtaining a certificate of public conveyance from the [ICC]. If, however, the trackage is used in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side tracks."

In determining whether a track is exempt the analysis consists only of determining its purpose. If the track is used for the actual haul of shipper to receiver, it is not exempt. If it's a side storage track, a yard track where trains are made up, a customers' own "in house" track, it is exempt. See *Illinois Commerce Commission v. United States*, 779 F2d 1270 (7th Cir. 1985). (A stub of track *.1 mile*

long to *one* rail customer receiving only *two cars a year* was right at the cusp of exemption, but not necessarily so.)

The fact that service will be the same as before is, of course, no basis for ICC exemption for the abandonment and joint use approval. Contrary to Judge Kopf's reasoning (Petitioner's Appendix, p. 26), railroads and magistrates don't make the determination how service will be affected or there is no need for an ICC. *Sacramento Northern Railway Trackage Rights*, 290 ICC 145; *Texas v. No.R. Co. Abandonment*, 275 ICC 808; *Sacramento R.Ry. Abandonment*, 282 ICC 804.

The Side Hill Lead formed part of the shipper to receiver actual transportation haul as did the Burlington Northern lines accommodating the haul after Side Hill was abandoned. The rails carried steady traffic. *Those are facts not in dispute.* This Court need only note that failure to find ICC jurisdiction over the abandonment and joint use was simply, clearly, and egregiously wrong.

B. Corp of Engineers.

The Omaha floodwall was built by the Army Corps pursuant to the Flood Control Act of December 22, 1944, specifically authorizing the funding of the Omaha project. That authorization incorporated the requirements of Section 3 of the Flood Control Act of 1936, which dictates the obligations of the local sponsor:

> (c) *maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.* 33 U.S.C. § 701c (emphasis added).

The regulations applicable to floodwall control, which are binding on the City of Omaha, are found at 33 C.F.R. § 208.10(5):

> *No improvement shall be passed over, under, or through the walls, levees, improved channels or floodways, nor shall any excavation or construction be permitted within the limits of the project right-of-way, nor shall any change be made in any feature of the works without prior determination* by the District Engineer of the [Army Corps of Engineers] . . . that such improvement or *alteration* will not adversely affect the functioning of the protective facilities . . . Advice regarding the effect of proposed improvements or alterations on the functioning of the project and information concerning methods of construction acceptable under standard engineering practice shall be obtained from the District Engineer or, *if otherwise obtained, shall be submitted for his approval* . . . (emphasis added.)

The Magistrate and the District Court acknowledged changes in the sewers required approval (Petitioners App, 28, 29, 85), but characterized the approval power over the City in the words of a Corps witness as "gentle persuasion" (Petitioner's App, 85). Elsewhere the same witness likened the Corps power over the City's private engineering plans for Schimmer & Associates to a "teacher," like "a little bird in the ear"* (Tr.985).

Such characterization of Corps' approval power over changes to the elaborate flood control system it built for

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*The court reporter heard a meaningless "low burden year" but this writer, about twelve feet from the witness, clearly heard "little bird in the ear." Would that IRS auditors were so timid!

Omaha was adopted by the Courts below but remains palpable nonsense. Agencies managing federal interests under statute and regulations have real power to enforce their regulations. The Schimmer and Associates sewer plans were required to be submitted to the District Engineer for his approval. The City's defiant refusal could have been corrected by suing the City in district court. "The United States must be empowered to sue for alleged violations of Section 701c [33 U.S.C. 701c] and the regulations because these provisions envision ongoing federal oversight." *United States v. City of Irving*, 482 F.Supp. 393, 395 (ND Tex. 1979), involving the statute and regulations at issue here.

C. National Park Service.

Under the doctrine of *Friends of the Shawangunks v. Clark*, 754 F2d 446, 451-52 (2nd Cir. 1985), the Secretary of the Interior retains approval power over substantial changes even after the federal money is spent as is the case here:

> Any future change that contravenes [the original] plans retroactively calls into question the basis for the original federal funding [under the Land and Water Conservation Fund]. Such a change necessarily requires the Secretary [of the Interior]'s approval, whether or not the change falls with the act's definition of a conversion.

Both *Shawangunks* and this case involve funds managed by the NPS under the Land and Water Conservation Fund Act, 16 U.S.C 460*l*-8(f)(3). At first blush one might think the *Shawangunks'* change vastly more extreme than here (back packers wilderness being encroached upon by golf resort v. city folks being denied a walk all around the

lake and most of their street access), but not really. A downtown park has very special requirements and this Court could conclude approval jurisdiction existed over the changes required by the Riverfront redevelopers. The NPS issue is not as clear cut as the ICC matter where logic will not permit the Court to deny the approval jurisdiction that springs from the admitted purpose and use of the tracks. Nor is the NPS issue as clear cut as the Corps matter where an acknowledged violation of a federal regulation must be more than mere bad manners by the City but rather a court correctable wrong. Nevertheless, what we call on this Court for on the NPS issue is not a re-examination of contested facts but a simple conclusion as to the reach of *Shawangunks* over non contested facts.

CONCLUSIONS

1. Conflict.

The Appellees cry out for this Court to test the third prong of *Ringsred*, when they justapose *Ringsred* with *Sierra v. Hodel*, 848 F2d 1068 (10th Cir. 1988) in an effort to show no conflict in the Circuits. The former, as applied to the Riverfront Redevelopment, is a double safetied gun locked in a drawer and the latter a hair trigger for NEPA and NHPA.

2. Important Case That Is Far Reaching.

This is an important case. A small urban tract set up for non federal development depends on the cooperation

of three federal agencies to take routine approval acts that will allow the development to proceed. In so doing, the agencies have the power *only* to make the participants *discuss* the damage to a historic district and *discuss* mitigation. The Congress has seen fit to deny substantive protection to historic properties and has imposed only the procedural benefits of asking developers to slow down enough to formally discuss things in a 106 review. ConAgra and the other developers behaved typically here, and as it happens all over the country, painting pictures of a project doomed if bureaucrats meddled. The third prong of *Ringsred* encourages the regulator to sit back and not do his duty, a comfortable option in the face of the political heat the developers routinely apply.

Better a hair trigger for NHPA and NEPA. Had one been in place here, political pettifoggery would be cut through, regulators would routinely do their NEPA and 106 reviews and in reasonable time Jobbers Canyon would have gotten due process. Given the power of the economic revitialization lobby, all or most of Jobbers Canyon would have probably been lost anyway, but mitigation as suggested in the Petition would then and now been possible. Judicial time and litigants' money would have been saved in huge portions if the developers had merely obeyed the law.

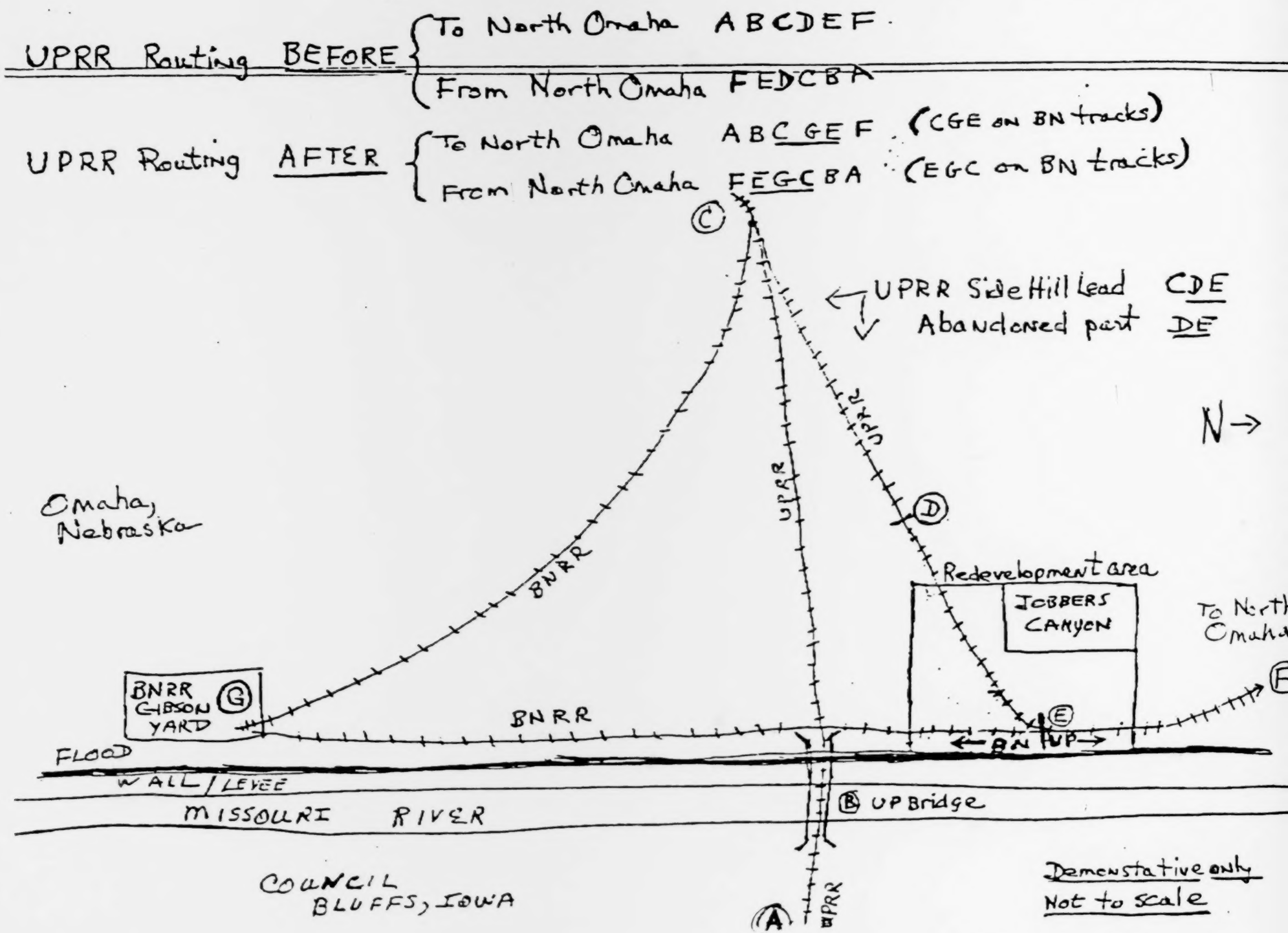
If this Court adopts a *Hodel*-like trigger, judicial time and litigant expense will be saved hereafter and all over the country. The routine and inevitable administration of procedural protection for historic treasures Congress ordered will be and should be an unremarkable fact of life.

The unseemly steamrolling by developers of officials into ignoring the law will be less frequent with a *Hodel*-like trigger.

Respectfully submitted,

PEOPLE FOR RESPONSIBLE
OMAHA URBAN
DEVELOPMENT (PROUD),
Petitioner,

EDWARD F. FOGARTY #11337
FOGARTY, LUND & GROSS
700 Service Life Building
1904 Farnam Street
Omaha, Nebraska 68102
(402) 341-3333


UPRR Routing BEFORE
To North Omaha A B C D E F
From North Omaha F E D C B A
UPRR Routing AFTER
To North Omaha A B C G E F (CGE on BN tracks)
From North Omaha F E G C B A (EGC on BN tracks)
UPRR Side Hill Lead CDE
Abandoned part DE
N
Omaha, Nebraska
BNRR
UPRR
UPRR
Redevelopment area
JOBBERS CANYON
To North Omaha
BNRR GIBSON YARD G
BNRR
BN UP
FLOOD WALL / LEVEE
MISSOURI RIVER
B UP Bridge
COUNCIL BLUFFS, IOWA
A
UPRR
Demonstative only
Not to scale